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IN THE

Supreme Court of the United States

October Term, 1968

No. 612

THEATRICAL PROTECTIVE UNION NO. 1, INTERNATIONAL ALLIANCE OF THEATRICAL AND STAGE EMPLOYEES, A.F.L.-C.I.O.,

Petitioner,

v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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v.

HAROLD PHALEN, STEPHEN AMADOR and HARRY RYAN.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

Harold Phalen, Stephen Amador and Harry Ryan, petitioners in the court below, brought this suit in the form of an Article 78 proceeding for an order "directing respondent union to admit each of the petitioners to membership" in Theatrical Protective Union No. 1, International Alliance of Theatrical and Stage Employees, A.F.L.-C.-I.O. (hereinafter called "the Union" (R. 7-11).

The petition and supporting papers allege that the Union has sole jurisdiction in New York and Bronx Counties amounting to "monopolistic power" (R. 11) over the hiring of stage hands and stage maintenance employees in local theatres. The Union, however, restricts its membership (R. 11), not on the basis of reasonable or objective criteria, such as experience or ability (R. 20), but generally on the basis that the candidate has been proposed by his father or a relative (R. 14). The appren-

tice training route is not open to petitioners, who are over 35, even in the unlikely event of being proposed by a Union member (R. 14).

Each of the petitioners had worked for many years as a stage hand or stage maintenance man and, before suing, "had applied many time to respondent for membership but had been refused" without valid reasons, every time (R. 11). Injury resulted to their right to take part in union activities that vitally effect their livelihood.

The "prime reason" for the Union's membership restrictive practices is to "perpetuate the members economic status at the expense of the non-member," allowing members to "easily earn $15,000.00 per annum, whereas non-members . . . have difficulty earning $4,000 per annum from covered employers." (R. 14). When they fall below that figure, their pension rights are imperiled (R. 10-11).

The Union, as the exclusive bargaining agent for stage hands and stage maintenance employees in theatres in its area, negotiates work conditions and pay scales for non-members as well as members (R. 12). Although petitioners must pay 4 per cent of their gross weekly salary to the Union (R. 12), they are never consulted about rates of pay and working conditions (R. 13), and self evidentially are taxed without representation. Adding to the injustice, the non-members' assessments are used to provide funeral expenses and other benefits for members only (R. 24).

The Union has unreasonably and illegally denied petitioners a right to economic security and to earn a living (R. 20). Some of the ways in which the denial works are vividly pictured in the affidavits. Petitioner Phalen recounts his difficulties in finding and holding a stage hand's job with normal continuity, of competing on an equal basis with the members of the Union, and of getting enough work to earn a living (R. 13). Petitioner Ryan's affidavit

documents the continual interruptions in his employment over a six year period (R. 16-19). One lay-off led him to file an unfair labor practice complaint with the National Labor Relations Board. The dispute was settled shortly afterward, when the Union agreed to get him a stage hand's job if he withdrew the complaint (R. 23).

Summary of Argument

The Union has violated petitioners' rights by its unreasonably restrictive admission practices. Their injuries include wrongful exclusion from a part in making the Union's policies and choosing its officers; and denial of a vote on the amount of dues or assessments or a voice as to terms to be proposed or accepted in bargaining collectively with employers. Petitioners have been left out of some of the economic benefits enjoyed by members, and taxed and regulated without representation. They have been indirectly damaged in their right to earn a living and to have equal access on merit to jobs in their chosen trade.

Those results of the Union's persistent, unjustifiable exclusion of petitioners from membership amount to actionable wrongs.

The courts of New York are not powerless to give relief from these wrongs. They can assure that petitioners will be considered for membership on the basis of fair and lawful criteria. An order under Article 78 would afford the needed relief; but if for any reason such an order is not available, the courts are free to award whatever remedy is appropriate.

The state courts are not rendered incompetent in this case on a theory of federal pre-emption, for no paramount federal interests are involved in this challenge to the Union's membership admission practices.

Question Presented

Does the National Labor Relations Board have power to grant union membership to a non-member working within the jurisdiction of a local or does Section 154(b)(1) of 29 U. S. C. A. oust the National Labor Relations Board in that area of granting an order directing union membership but relegating the individual to state courts as only the state courts have jurisdiction over issues involving the internal workings of a union.

I

The Union has violated petitioners' rights by unjustifiably barring them from membership.

The main issue raised by the petition for a Writ of Certiorari is a fundamental one: Is it true that no New York court has any concern about who is admitted to or barred from membership in a union, or why—on the reasoning that no person has any legal right to join a union? Petitioners say it is not true. They rely on considerations of fairness, sound policy and justice, as well as a strong trend in the developing statutory and case law. The Union answers Yes and invokes analogy and old precedents.

The main argument from analogy runs, in effect, "No one could enlist the law to force his fellowship on the members of a golf club, a beach club, a lodge or a fraternity. No more can he do so to get into a union."

Underlying that argument is the unspoken but false assumption that the motive and effects involved in joining are similar in the two cases. Applicants for membership in a golf club have a yen for fun and fellowship. But men who want to become members of a union have their livelihood uppermost in mind. This difference became apparent nearly a generation ago:

> "It is one thing to exclude a person from participating in enjoyable social functions, but it is another thing to exclude him from participating in determining the rules which will govern his working hours and his economic well-being." Summers, "The Right to Join a Union," 47 Colum. L. Rev. 33, 43-44 (1947).

Exclusion from taking part in determining the rules under which they earn a living precisely describes the kind of injury petitioners have suffered. For such an injury judicial remedy exists and no musty learning can stand in the way of its recognition.

The dicta that long ago asserted that unions, as voluntary associations, have an absolute right to select their members without interference from any quarter, rested on social conditions long since outdated and theories now discarded. They were uttered before the dawn of the era in which the economic well-being of the workingman became intimately bound up with labor union activities. They depended on a view of what unions are, what role they play in the lives of workingmen in many lines of work, that is totally unreal today.

In those days the relationship created by joining a union was thought to be one of a highly personal nature. Recognizing the "futility of attempting to force one man's companionship on another," the courts were loath to order unions to admit applicants. Some decisions laid it down that the unions had as much power to exclude as a fraternal lodge—for any reason at all or no reason whatever. Those days have passed. For at least a generation it has been absurd to apply legal rules covering clubs, fraternities and other social groups to the problem of admission to labor unions.

As the record in this case shows, membership in the respondent Union is for these petitioners the key to an effective voice in labor relations and working conditions and to a chance for equal job opportunity. Non-members are not consulted in the collective bargaining process with regard to such matters as the work conditions or pay scales they seek (R. 13). They have no voice in determining the Union's officers or policies, although both will affect their livelihood. Ryan's affidavit shows a regular assessment of 4 per cent of gross earnings, payable to the union, in part to defray benefits for members only (R. 24). Their employment tends to be sporadic, irregular, constantly interrupted (R. 13, 16-19). In the Union's hiring hall they are at a disadvantage compared to members.

On the record here all those well-pleaded allegations by petitioners stand admitted.

Likewise beyond dispute is the Special Term's finding that the Union's "arbitrary refusal to admit petitioners into membership has either effectuated or threatens to effectuate, a divestment of their pension fund benefits . . ." (R. 33).

In the face of these demonstrations of injury to important interests, no modern court would hold that petitioners have failed to set forth a claim that substantial rights have been invaded.

The majority of the Appellate Division, in dismissing the petition, did not deny the substantive validity of petitioners' claims. Their decision went on a procedural point, namely that suit under Article 78 in the nature of mandamus is not an allowable remedy against a union "in the absence of a violation of a statutory duty" (43). We show in Point II, below, that this was a needlessly technical view of the procedural posture of the case.

The critical point here is not procedural but substantive. These petitioners have substantial rights in relation to the Union, and those rights were violated.

True, no non-member can point to a statute or decision that in terms gives him an absolute right to join this union or that. But every non-member can assert a right not to have his application rejected arbitrarily, unreasonably, or on unjust grounds.

Limits on unions' power to exclude applicants have appeared increasingly in both legislative and judicial pronouncements. In the Civil Rights Act of 1964 Congress put the stamp of national concern on the problem. Many years earlier the legislature of this State had given impetus to the movement by adopting Section 43 of the Civil Rights Law. Both statutes forbid unions to exclude individuals from membership on grounds of race, color, religion, sex or national origin. They establish that the so-called "free choice" and "voluntary association" dogmas of yesteryear have no application to contemporary unions. They recognize that unions hold too much power over economic opportunity for too many people to be left to follow whims and caprices under the mask of free choice.

The fact that the national and state legislatures have banned discrimination for specified reasons does not mean that unions have carte blanche to practice it for other reasons. The legislation does not license them to behave arbitrarily or unjustly in their admission practices as long as they avoid the enumerated prohibitions. Legislative action has not meant judicial paralysis. Far from excluding parallel judicial trends, the enactments have reinforced them.

A clear line of authority has emerged, distinguishing between social groups on the one hand and professional or vocational groups on the other. The Order of Eastern Stars may as a social group bar whichever ladies it will

for whatever reasons it will, but the same is not true of an organization that wields economic power over would-be members' lives. See *Trautwein* v. *Harbourt*, 40 N. J. Super. 247, 123 A. 2d 30 (1956), certification denied 22 N. J. 220, 125 A. 2d 233 (1956). A clear expression of the difference has appeared in cases testing whether a medical society may exclude a doctor on grounds that are unrelated to objective standards.

Older cases mechanically applied the dogma that a medical society is a voluntary association with absolute control over its own membership rolls. Recent authority holds that the group's virtual monopoly over the practice in a locality makes membership a practical necessity. Fairness in admission policies and practices will be enforced by courts with increasing readiness. The leading case is *Falcone* v. *Middlesex County Medical Society*, 34 N. J. 582, 170 A. 2d 791 (1961), where the doctrinal metamorphosis is carefully traced (34 N. J., at p. 596, 170 A. 2d, at p. 799):

> ". . . When courts originally declined to scrutinize admission practices of membership associations they were dealing with social clubs, religious organizations and fraternal associations. Here the policies against judicial intervention were strong and there were no significant countervailing policies. When the courts were later called upon to deal with trade and professional associations exercising virtually monopolistic control, different factors were involved. The intimate personal relationship which pervaded the social, religious and fraternal organizations were hardly in evidence and the individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy consideration. Here there have been persuasive indications . . . that in a case

> presenting sufficiently compelling factual and policy considerations, judicial relief will be available to compel admission to membership. . . ."

Dr. Falcone was ordered admitted to membership in the Society. He had been kept out because, although he had attended a State-accredited medical school for a full course and satisfied the written by-laws' standards, and was a qualified physician, his main medical training was in a school not approved by the A.M.A. The Society's ethics committee imposed an unwritten requirement of A.M.A. approval and rejected Dr. Falcone. The Supreme Court of New Jersey declared that membership in the Society was "an economic necessity" and that (*id.*, at p. 592, 170 A. 2d, at p. 797):

> ". . . in dealing with such an organization, the court must be particularly alert to the need for truly protecting the public welfare and advancing the interests of justice by reasonably safeguarding the individual's opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization. . . ."

In 1964 the Court of Appeals of the State of New York carefully considered and strongly approved the *Falcone* decision as one in which the court had ordered the applicant admitted to membership "because he proved both monopoly and economic necessity." *Salter* v. *New York State Psychological Association*, 14 N. Y. 2d 100, 107, 248 N. Y. S. 2d 867, 872, 198 N. E. 2d 250, 253 (1964). However, Salter's situation was different, for he failed to satisfy the Association's objection requirement of post-graduate work. The Court of Appeals of the State of New York accordingly, declined to hold the Association's action improper. (See, also, *Firestone* v. *First District Dental Society*, 24 A. D. 2d 268, 265 N. Y. S. 2d 525 (1st Dept. 1965); *Kurk* v. *Medical Society of Queens, Inc.*, 46

Misc. 2d 790, 260 N. Y. S. 2d 520 (1965), *revd. on other grounds*, 24 A. D. 2d 897, 264 N. Y. S. 2d 859 (2d Dept. 1965).)

The *Falcone* doctrine applies with equal force to arbitrary exclusion practices by a labor union with monopolistic powers when economic injuries result, as they have to these petitioners. As long ago as 1925 this Court, in a labor union case, *Simons* v. *Berry*, 240 N. Y. 463, 465, 148 N. E. 636, 637 (1925), declared (per Judge Cardozo):

> ". . . Equity will enjoin the denial to a member of the privileges of membership where the denial, if continued, will work irreparable injury."

Simons had been a member of a local printing pressmen's union, the charter of which was revoked by the parent international union. He applied for membership in the international, but was rejected. The Appellate Division dismissed his complaint that asked for membership, an injunction and damages against the union, but the Court of Appeals for the State of New York reversed, making clear that union membership privileges are valuable rights, deserving of protection against illegal denial.

Outside New York, a parallel trail was marked by farsighted New Jersey and California decisions. In *Wilson* v. *Newspaper and Mail Deliverers' Union*, 123 N. J. Eq. 347, 350-351, 197 A. 720, 722 (1938), the court admonished the union that had refused Wilson's application for membership: "the holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others."

The theme that a union's greater power imposes greater responsibility to play fairly with applicants was recognized in California in *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P. 2d 329, 335 (1944), the Supreme Court stating:

> " . . . Where a union has, as in this case, attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal organizations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living. . . . "

See, also, *Blende* v. *Maricopa County Medical Society,* 96 Ariz. 240, 393 P. 2d 926 (1964); *Kronen* v. *Pacific Coast Society of Orthodontists,* 237 Cal. App. 2d 289, 46 Cal. Rptr. 808 (1st Dist. 1965).

To forbid a union to discriminate for race or religion, as the statutes do, or for other arbitrary and unreasonable considerations, as the courts increasingly do, does not leave the unions helpless to control admission. They remain entirely free to adopt fair criteria of admission and to administer them with equality and reasonable objectivity. Applying fair criteria, they could keep out individuals who are incompetent at their trade or occupation, who engage in spying or other activities calculated to injure the union, who have criminal records, or who are otherwise unfit.

No such grounds have been shown here or could be. The Union has made no effort to justify its refusal to admit petitioners to membership. It does not pretend that they are unqualified—morally, physically, mentally, or by reason of incompetence at their work. It does not try to relate their rejection to any objective criteria. It stands on an uncompromising assertion of a presumed right to bar them, whatever the injury to their economic well-being and regardless of its power over their occupations.

In pursuing that course, the Union has substantially injured the petitioners in respect to substantial legal interests. The question that remains is what kind of judicial redress is appropriate for their injury.

II

Having shown injury to substantial rights, petitioners are entitled to due relief.

Petitioners' basic right to be considered for membership in the Union by fair and reasonable criteria was not challenged by the court below. Its order of dismissal was dictated by its view that applicable procedural rules hold "an Article 78 proceeding for mandamus does not lie" in these circumstances.

If mandamus is not available, what about other types of relief? The possibility of awarding a different remedy seems not to have occurred to the Appellate Division majority.

Its order thus rested upon the mistaken view that the court was bound by old and narrow precedents that preclude mandamus-style relief; and upon the wrong impression that if the requested remedy is not available, the court has no alternative but to dismiss.

That may have been the law in centuries past, but petitioners before New York courts who today show an invasion of their legal interests become entitled to a remedy, even if the court thinks they have mistaken its form. Section 103(c) of the Civil Practice Law and Rules of the State of New York is clear and categorical that

> "a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form. . . ."

Instead of dismissing the suit, "the court shall make whatever order is required for its proper prosecution." This applies not only to traditional "actions" but also to special proceedings of the Article 78 type, as CPLR §103 (b) of the State of New York makes clear:

> ". . . procedure in special proceedings shall be the same as in actions, and the provisions of the civil practice law and rules applicable to actions shall be applicable to special proceedings."

These provisions are a firm directive to the courts to bend their efforts to cure defects in matters of form. A court with jurisdiction over the parties may not resign in the face of a merely formal mistake. It must make whatever order is required for the proper prosecution of the case. There is no longer a "procedural no man's land." Weinstein, Korn & Miller, New York Civil Practice §401.03, pp. 4-7.

Perhaps in using the cryptic phrase "mandamus does not lie" the court was challenging more than the particular writ and was ruling that no Article 78 relief of any kind would lie. If so, its ruling is erroneous for failing to take account of CPLR §§3017 and 7806 of the State of New York. Those provisions make plain that the result of seeking an incorrect or unavailable remedy is a corrective order, not a dismissal.

Section 3017(a) of the CPLR of the State of New York provides in its relevant part that

> "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just."

Under that grant of authority the courts have general power to award whatever relief is called for by the case made, with conditions added as circumstances require, in the interests of justice.

To fortify that general authority in Article 78 proceedings, CPLR §7806 of the State of New York specifically provides that the judgment in a special proceeding "may grant the petitioner the relief to which he is entitled," regardless of his prayer.

When the Appellate Division, First Department, Supreme Court of the State of New York reached the conclusion that mandamus-style relief under Article 78 was not appropriate against the Union by reason of the absence of a "statutory duty," it was obliged to consider other relief—declaratory judgment, equitable injunction, or whatever remedy it might fashion to assure an efficacious result. (See *Matter of Nowak* v. *Wereszynski*, 21 A. D. 2d 427, 430, 250 N. Y. S. 2d 981, 983 (4th Dept. 1964).) Any remedy that does not depend on whether the duty breached is "statutory" might have qualified.

Petitioners' grievances should have been decided on their merits, not dismissed on a procedural nicety. To dismiss for assumed technical restrictions is contrary to both the letter and spirit of the CPLR of the State of New York.

But even if the court were in truth restricted to awarding mandamus or nothing, it should have decided for mandamus. Petitioners' rights were violated by the Union's continuing determination not to consider their applications on fair criteria. That action was "arbitrary and capricious" and an abuse of discretion. There being no contractual or other private legal relationship, a proceeding under Article 78 is the indicated remedy; and of the Article 78 remedies a directive order in the nature of mandamus is more suitable than a certiorari-style review, or an order of prohibition, which attacks jurisdiction.

The arguments in said Appellate Division were that the requested remedy is unavailable because there is "an ade-

quate remedy at law," because no "statutory duty" exists, and because the Union, as an unincorporated group, is immune from a mandatory order. Those arguments rest upon a dubious reading of the cases and a neglect of the plain language of Article 78.

Nowhere in the CPLR of the State of New York is Article 78 relief restricted or conditioned in any of those ways. Nothing in the CPLR of the State of New York makes Article 78 a second-class or a last-extreme remedy compared to other types of proceedings. There is no hint of an "adequate remedy at law" restriction on relief under the Article. If the New York State legislature had intended that these proceedings be available only when no other legal remedy is open, it would have found the words to say so, explicitly, as it did in Section 7801 of the State of New York in requiring finality and exhaustion of remedies as prerequisites to Article 78 review. Those requirements are obviously designed to prevent resort to the courts while administrative or other non-court channels of correction are still open. Those requirements have no applicability here, where there are no non-judicial stones unturned. Cf. *Matter of Towers Man. Corp.* v. *Thatcher*, 271 N. Y. 94, 98, 2 N. E. 2d 273, 274 (1936). The Union's repeated rejection of petitioners' application is "final." They have no further recourse. No unused opportunity for rehearing exists. There is no appellate path to obtain a review of the Union's actions.

While random expressions appear in some of the cases indicating that the absence of an adequate remedy at law is a condition to maintaining mandamus-type proceedings, the expressions obviously do not rewrite the 1963 statute.

These petitioners did all they were required to do by way of exhausting non-judicial remedies when they ap-

plied and reapplied to the Union for admission to membership and received unqualified rejections. Being properly before the court on substantial claims of right, they ought not be ejected on the ground that since they chose to enter by the wrong door, they must now depart, and return by a different one. Their petition asks for an order "directing respondent to admit" them, and they are not disposed to cavil about how the court accomplishes that result.

The absence of a "statutory duty" or a "duty specifically enjoined by law" once deterred many courts from ordering mandamus, but it is no longer crucial, now that other grounds have been added. Under the present provisions of Article 78 separate and sufficient grounds for mandatory relief are present if the challenged determination was "arbitrary and capricious" or "an abuse of discretion." CPLR §7803, subd. (3) of the State of New York. The leading commmentators in the field summarize as follows the impact of the new provisions (Weinstein, Korn & Miller, §7803.06, p. 78-41):

> "CPLR 7803 (3) now specifically provides that a claim of an 'abuse of discretion' or of 'arbitrary and capricious' action is reviewable under Article 78. The addition of this explicit language should serve to vindicate the substantial body of previous authority permitting review of the exercise of discretion and rejecting the inference that the 'duty enjoined by law' language [states the exclusive ground]."

Included in the previous authority were pre-1963 decisions by said Court of Appeals allowing mandamus-style proceedings to challenge actions as "arbitrary and capricious" or an "abuse of discretion." *Matter of Brown*

v. *McGinnis*, 10 N. Y. 2d 531, 225 N. Y. S. 2d 497, 180 N. E. 2d 791 (1962); *Matter of Mandle* v. *Brown*, 5 N. Y. 2d 51, 177 N. Y. S. 2d 482, 152 N. E. 2d 511 (1958); *Matter of Diocese of Rochester* v. *Planning Board of Brighton*, 1 N. Y. 2d 508, 154 N. Y. S. 2d 849, 136 N. E. 2d 827 (1956); *Matter of Brenner* v. *O'Connell*, 308 N. Y. 636, 127 N. E. 2d 715 (1955).

Since 1963, mandamus has been utilized on those grounds in several cases decided in the lower courts. See, *e.g.*, *Matter of Mancuso* v. *New York State Employees' Retirement System*, 42 Misc. 2d 261, 247 N. Y. S. 2d 956 (Sup. Ct. 1964); *Matter of Caruci* v. *Dulan*, 41 Misc. 2d 859, 246 N. Y. S. 2d 727 (Sup. Ct. 1964), *rev'd on other grounds*, 24 A. D. 2d 529, 261 N. Y. S. 2d 677 (4th Dept. 1965); *Matter of Council* v. *Donovan*, 40 Misc. 2d 744, 244 N. Y. S. 2d 199 (Sup. Ct. 1963).

Whether or not the Union's rejection of petitioners' applications was a "determination," it was by any test arbitrary and capricious and an abuse of the discretion lodged in the Union by law. It is properly challenged by the proceeding filed.

The contention that mandamus will not lie against a voluntary association is ultimately based on *Matter of Weidenfeld* v. *Keppler*, 84 App. Div. 235, 82 N. Y. S. 634 (1st Dept. 1903), *aff'd* 176 N. Y. 562, 68 N. E. 1125. *Weidenfeld* is a thin reed to support so heavy a burden. The petitioner there brought mandamus against the president of the Stock Exchange to secure reinstatement to membership. In denying him relief, the Appellate Division thought the single question in the case was whether "mandamus is the proper remedy," and concluded it was not. The Court of Appeals for the State of New York affirmed without opinion.

The reasoning in the *Weidenfeld* case was that since the state had not chartered the Exchange, the latter derived no rights from it; hence, the question presented did not partake of a "public nature."

That reasoning has no applicability to a union exercising the kind of economic control over petitioners' livelihood that the record in this case describes. Whether or not *Weidenfeld* would today be upheld on its facts need not concern us. Times are different, the law has moved and the Union in 1967 is not the Stock Exchange of 1903.

This Court has recently recognized that an Article 78 proceeding is a proper means of obtaining judicial review of a denial of membership in a voluntary association. In *Salter* v. *New York State Psychological Association*, *supra*, 14 N. Y. 2d 100, 248 N. Y. S. 2d 867, 198 N. E. 2d 250 (1964), a mandamus-style petition was brought, was entertained in the lower courts without dissent, and was sanctioned by this Court. Dr. Salter was not able to meet the Association's reasonable requirements, but his case shows that the court below erred in its view that "mandamus does not lie" in a membership rejection proceeding.

III

The state courts are not rendered incompetent by the federal pre-emption doctrine.

New York courts are not ousted from competence over this suit on any theory of federal pre-emption. There is no great federal question here involving strikes, boycott, collective bargaining or other labor-management issues of national impact. No employer has been sued. Employment relations come into the picture only in the most tenuous and peripheral manner, if at all.

The relief sought defines the controversy as one within state court competence. Petitioners seek "an order . . . directing respondent to admit each of said petitioners to membership . . ." (R. 11).

This problem is not one the Congress has committed to the exclusive competence of the National Labor Relations Board. On the contrary, the Labor Management Relations Act, while investing the Board with jurisdiction over "unfair labor practices," deliberately preserves the union's control of membership by declaring (29 U. S. C. A. §158(b)(1)):

> ". . . *Provided*, That this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

In Judge Breitel's words, this "provision seems to make clear Congress' unconcern with internal rules governing membership in a union or their application, rightly or wrongly, to particular members." (See *Real* v. *Curran*, 285 App. Div. 552, 556, 138 N. Y. S. 2d 809, 813 (1st Dept. 1955); see, also, *Green* v. *Folks*, 13 A. D. 2d 744, 215 N. Y. S. 2d 116 (1st Dept. 1961). In those cases, both involving claims for wrongful expulsion from union membership, the court held it had jurisdiction. Admission to membership is equally within the New York courts' competence. In both the *Real* and *Green* cases, *supra*, the Court in both instances ignored the defense of the doctrine of pre-emption.

After the decision below was rendered, the Union States Supreme Court in *Vaca* v. *Sipes*, 386 U. S. 171, 87 S. Ct. 903 (1967), review and reiterated the bounds of the pre-emption doctrine in a way that puts the issue to rest

in favor of state court competence. Owens, a union member, sued officials of his Union in a state court claiming in part that they had breached their duty to represent him fairly in disputes with the employer by arbitrarily refusing to carry his grievance to arbitration. (Owens' claim was that his blood pressure was not too high for him to work in Swift & Company's plant, despite medical opinion to the contrary.)

On its motion to dismiss, the Union argued that Owens' suit was "arguably and basically" one for an unfair labor practice within the NLRB's exclusive jurisdiction. The Supreme Court rejected that contention after a careful analysis of the pre-exemption doctrine and its own decisions thereon. It concluded that (*id.*, 386 U. S. 171, at p. 179, 87 S. Ct., at p. 911):

> "This pre-emption doctrine . . . has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB. . . ."

Exclusivity will not be presumed; to infer it requires justification. Only if allowance of state remedies will bring down adverse effects "upon the administration of national labor policies" is pre-emption warranted. There is to be no ouster of state courts with out a showing of "need" (*id.*, 386 U. S. 171, at pp. 180-181, 87 S. Ct., at p. 912):

> "A primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union duty of fair representation."

Even less is pre-emption applicable to the present issue of prescribing and applying fair criteria for admission to union membership.

The opinion of the Court of Appeals for the State of New York unanimously reversed the order of the Appellate Division and is reported in 290 N. Y. S. 2d 881 (22 N. Y. 2d 34).

The opinion of Judge Fuld, appears at 290 N. Y. S. 2d page 887 where he said the following in discussing the doctrine of pre-emption, acquisition or retention of membership, authority of the state to pass on the issue of membership and the right of unions to arbitrarily bar workers from membership at page 887:

I agree with Judge Burke for reversal but I cannot accept the assumption—which seems, in part, to underly his reasoning—that labor organizations "enjoy 'full freedom of association' " and are under no duty to open their membership "to persons whom they would rather not admit to their company", except in certain extraordinary, but undefined, circumstances (opinion, 22 N.Y. 2d p. 41, 290 N.Y.S. 2d p. 886, 238 N.E. 2d p. 299). Nor am I able to subscribe to the suggestion (opinion, pp. 39-40, 290 N.Y.S. 2d 885, 238 N.E. 2d 298) that an aggrieved individual will have adequate relief, in an action against the union for breach of its duty of fair representation, the court merely enjoins continuance of discriminatory conduct in the future and awards damages stemming from past discrimination. For these reasons, I am impelled to write a separate opinion.

It is my view that, if a labor organization arbitrarily refuses to admit to membership persons, otherwise fully qualified by experience and ability, they are entitled, in a case not covered by section 43 of the Civil Rights Law, to an order or injunction directing the union to admit them

to membership.[1] On a motion to dismiss a pleading, be it complaint or petition, we read the allegations most favorably to the pleader (see, e.g., Kober v. Kober, 16 N.Y. 2d 191, 193-194, 264 N.Y.S. 2d 364, 365-366, 211 N.E. 2d 817, 818; Condon v. Associated Hosp. Serv., 287 N.Y. 411, 414, 40 N.E. 2d 230, and, so read, the allegations in the challenged pleading are sufficient to make out a cause of action entitling the petitioners to such an order.

National labor policy has been built on the premise that a majority labor organization is the most effective vehicle for obtaining improvements in wages, hours and working conditions. Consequently, it has been said, that policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees." (NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 2006, 18 L.Ed.2d 1123). The importance of the union in the economic life of the employee today cannot be overemphasized and, accordingly, its authority to act as exclusive representative is subject to the concomitant obligation to represent all members of the bargaining unit "without hostility or discrimination toward any, to exercise its discretion without complete good faith and honesty, and to avoid arbitrary conduct." (Vaca

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[1] The requirements of section 807 of the Labor Law have no application to a proceeding by an employee against a labor organization to admit him to membership. Section 807—derived from section 876-a of the Civil Practice Act (the little Norris-LaGuardia Act)—is simply designed to prevent the issuance of injunctions, principally on the application of employers, in labor disputes, a term so defined in subdivision 10 (par. [c]) of the statute as to clearly exclude controversies between a union and its members or potential members. (See e.g., Wolchok v. Kovenetsky, 274 App. Div. 282, 284, 83 N.Y.S.2d 431; Caliendo v. McFarland, 13 Misc. 2d 183, 175 N. Y. S.2d 869.)

v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 17 L.Ed.2d 842; Humphrey v. Moore, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L. Ed. 2d 370.) A union which breaches its statutory mandate to represent all employees fairly and without discrimination is subject to an action for damages and an injunction to prohibit the continuance of the discriminatory conduct. (See Steele v. L. & N. R. Co., 323 U.S. 192, 207, 65 S.Ct.226, 89L.Ed. 173; Tunstall v. Brotherhood, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187; Syres v. Oil Workers Int. Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 785.)

The Supreme Court in the *Steele* case (323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra), declared that the Railway Labor Act imposed on the union, a duty, "in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith" (323 U.S., at p. 204, 65 S.Ct. at p. 233).[2] And, in ensuing years, the courts have applied the doctrine to cases involving racial, see, e.g., Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283), as well as nonracial (see, e.g., Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra; Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed.2d 370,

[2] On the same day on which it decided *Steele* (323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra), the Supreme Court also interpreted the National Labor Relations Act to require fair representation, saying that a union, as the agent of all the employees, was "charged with the responsibility of representing their interests fairly and impartially." (Wallace Corp. v. Labor Bd., 323 U.S. 248, 255, 65 S.Ct. 238, 242, 89 L. Ed. 216; see, also, Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L. Ed. 1048; Cyres v. Oil Workers Int. Union, 350 U.S. 892, 76 S.Ct. 152, 100 L.Ed. 822, supra; Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370, supra.)

supra; Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048), discrimination.

However, an action for breach of the duty of fair representation by one who has been discriminated against, although it may afford him an important remedy, is no substitute for democratic participation in the affairs of the union. Unless an individual is a member of the union, he can have no voice in the selection of its officers who are his representatives in the collective bargaining process. Nor can he, if a non-member of the union, express his approval or disapproval of the terms of the collective bargaining agreement, which most vitally affects every day of his working life, embodying as it does the wages and terms and conditions under which he is to work. Again, as a nonmember, an employee will have no say (within the union) as to questions pertaining to grievances arising under the collective bargaining agreement even though the interpretation and enforcement of the agreement may have a most serious impact upon him.

Furthermore, a union is free to take positions between sets of conflicting employees represented by it and is allowed a wide range of reasonableness in serving the unit it represents so long as it acts in good faith. (See Humphrey v. Moore, 375 U.S. 335, 349, 84 S.Ct. 363, 11 L.Ed.2d 370, supra; Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S.Ct. 681, 97 L.Ed. 1048, supra; Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra.) The line of demarcation between the reasonable exercise of discretion and arbitrary abuse of power is often shadowy, and membership in the union of all qualified workers will furnish at least minimum assurance that the statutory bargaining agent has acted in good faith and in a nonarbitrary manner. A union official might well think twice before dis-

criminating against a worker, or a class of workers, if those discriminated against might, as members of the union, prevent his re-election.

Labor organizations, given the power to act as exclusive bargaining agents, are quasi-public organizations and ancient dogma, which described them as voluntary associations with unfettered control over their membership rolls, must be revised in the light of the realities of present-day industrial life. Membership in a union is, today, a matter which critically affects a person's ability to earn a living. It follows, therefore, that a labor organization may not arbitrarily exclude an employee from membership and that any discriminatory exclusion from such membership must be condemned and stricken under state law (see Note, 59 Col.L.Rev. 190, 199-200).

These views are not in conflict with what the court said in Gaynor v. Rockefeller, 15 N.Y.2d 120, 256 N.Y.S.2d 584, 204 N.E.2d 627. We there held that the courts will not, at least in the first instance, issue an injunction mandating a labor organization to admit to membership persons excluded because of race, creed, color or national origin. But that conclusion was dictated, in large part, by the fact that in that case the plaintiffs against whom racial discrimination was being practiced were given a full and adequate remedy by resort to the State Commission for Human Rights (Civil Rights Law, §43). In the case before us, however, no such relief is available to the petitioners and, consequently if there is to be redress, it must be by way of a judicial proceeding. The Legislature did not consider whether the arbitrary exclusion of an employee for any reason other than race, color, creed or national origin requires the specially flexible and sensitive procedures available to the Commission for Human Rights (Executive

Law, §297, subd. 2). But, certainly, designation of that commission to deal with racial and religious discrimination did not take from the courts the broad powers vested in them to grant to parties aggrieved by wrongful conduct such relief as the situation demands.

It is true that the petitioners, by applying to the National Labor Relations Board or by bringing a *Steele*-type action, could have obtained an injunction against the union, forbidding continuation of their discriminatory conduct, as well as damages suffered by them (National Labor Relations Act, §8, subd. [b], par. [2]; see, e. g., Steele v. L. & N. R. Co., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173, supra). But the National Labor Relations Board is powerless to order that they be admitted to membership (infra, p. 47), and an injunction which merely enjoined the union from continuing its wrongful conduct would be utterly inadequate and incomplete relief. Lawsuits and injunctions are no substitute for the processes of democracy. Nothing less than membership in the union can give the petitioners—assuming they prove their allegations—their rightful opportunity to participate, however, indirectly, in the making of decisions which affect them so materially. Nor will a court injunction against discriminatory conduct enable them, in seeking jobs, truthfully to represent to prospective employers that they are members of the union having jurisdiction over the work involved—a representation which, as a practical matter, may be an indispensable prerequisite to obtaining employment.

This does not, of course, mean that a union must open its doors to felons (see Sovern, Legal Restrains on Racial Discrimination in Employment, ch. 6, p. 152, n. 43), to persons not qualified to perform the work of the bargaining unit or to persons who for any reason have undertaken to

destroy the union.[3] It does mean, though, that the union must admit all workers to membership without discrimination and that if, in bad faith or arbitrarily, it rejects an applicant, it may be compelled by order of the court—or in the case of racial discrimination by direction of the Human Rights Commission—to admit him to membership.

On the question of Federal pre-emption, I would say but a few words. Although I agree with Judge BURKE that the present action is not federally pre-empted, I hesitate to place sole reliance, as he has, on Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842, supra, in view of the very restricted meaning which had been given that decision by knowledgeable commentators. (See, e. g., Lewis, Fair Representation in Grievance Administration: Vaca v. Sipes, 1967 Supreme Court Review 81, 99.) My reason for concluding that there is no Federal pre-emption in this case is very simple: the National Labor Relations Board does not have the power to direct a labor union to admit a worker to membership.

Section 8(b) (1) (A), which makes it an unfair labor practice for a union to restrain or coerce employees in their right to engage or refrain from engaging in collective activities, adds the proviso "[t]hat this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein". (See, e.g., NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 184, 186, 87 S.Ct. 2001, 18 L.Ed.2d 1123, supra.) The Supreme Court, construing that

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[3] In Tawas Tube Prods. (151 N.L.R.B. 46, 48), the board held that a union did not violate section 8(b) (1) (A) because of its expulsion of members who had filed a decertification petition since the proviso to section 8(b) (1) (A) "would necessarily allow a union to expel members who attack the very existence of the union as an institution."

proviso, held in International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018, that a state court was not precluded, by virtue of the pre-emption doctrine, from restoring to membership a union member who had been wrongfully ousted from the union and that the state had the power to award consequential damages even though those damages might be for conduct which constituted an unfair labor practice. (See, also, Local 100 of the United Assoc. of Journeymen & Apprentices Union v. Borden, 373 U.S. 690, 696-697, 83 S.Ct. 1423, 10 L.Ed.2d 638.) In the course of its opinion, the court declared that "to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act" (356 U.S. at p. 620, 78 S.Ct. at p. 925) [4].

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[4] In 1963, five years after *Gonzales*, the court summarized its holding in that case in these words (Local 100 of the United Assoc. of Journeymen & Apprentices' P. Union v. Borden, 373 U.S. 690, 696-697, 83 S.Ct. 1423, 1427, 10 L.Ed.2d 638, supra): "It was recognized in that case [Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018] that restoration of union membership was a remedy that the Board could not accord and indeed that the *internal* affairs of unions were not in themselves a matter within the Board's competence. The Court then went on to hold that, in the presence of admitted state jurisdiction to order restoration of membership, the State was not without power 'to fill out this remedy' by an award of consequential damages, even though these damages might be for conduct that constituted an unfair labor practice under federal law."

Thus, it is indisputable that the National Labor Relations Board lacks the power to regulate admission of workers to union membership, and an order issued by a state court requiring a union to grant membership to a worker would not conflict with any board remedy. It is hardly necessary to add that there is no perceivable difference, in the present context, between *restoring* to membership an employee wrongfully ousted and *admitting* one who has been wrongfully excluded from such membership. The injustice suffered by the worker in either case is precisely the same.

In sum, the petition sufficiently alleges that the respondent union violated the petitioners' right to be considered for membership on the basis of fair standards, fairly applied. If, following interposition of an answer by the respondent and a hearing at Special Term, the petitioners' allegations are proven, they are entitled to an order requiring the respondent to admit them to membership and to such other additional relief as may be appropriate.[5]

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[5] Even though the petitioners may have requested relief to which they are not entitled, CPLR 3017 (subd. [a]) provides—as Judge Burke observed in his opinion (22 N.Y.2d p. 41, 290 N.Y.S.2d p. 887, 238 N.E.2d p. 299)—that "the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded". (See, also, 1 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 401.03, pp. 4-7, where it is said, "Under the new practice there is no "procedural no-man's land' ".)

Conclusion

The Union has violated petitioners' right to be considered for membership in the Union on the basis of fair standards, fairly applied. Its arbitrary and unjustifiable rejection of their applications has injured these workingmen in substantial ways. They are entitled to judicial redress for their injuries.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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